Privy Council Appeal No. 52 of 1942

Mian Saleh Mohammad Shah – – – – – – *Appellant*

v.

Sayyad Zawar Hussain Shah and another – – *Respondents*

Same – – – – – – – – – – – *Appellant*

v.

Same – – – – – – – – – – *Respondents*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND NOVEMBER, 1943

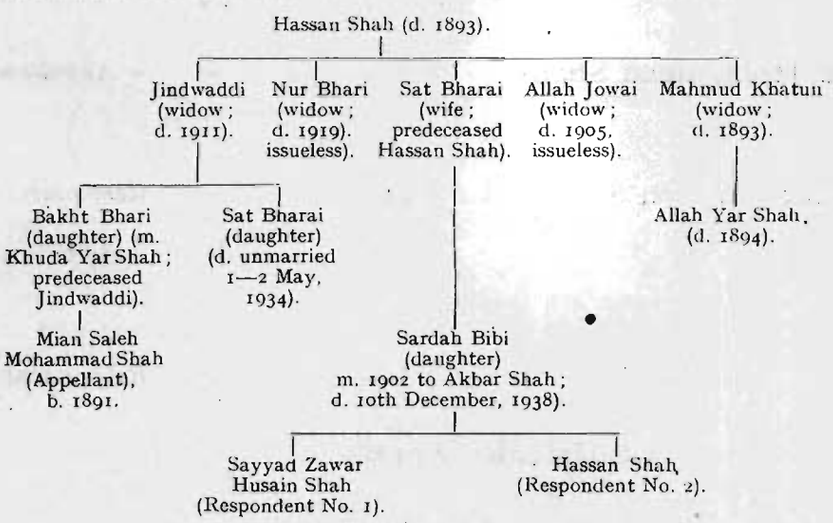
Present at the Hearing:

LORD ATKIN
LORD ROMER
SIR GEORGE RANKIN

[*Delivered by* SIR GEORGE RANKIN]

In this consolidated appeal the question is whether the appellant on the death in 1934 of his mother's sister, Sat Bharai, became entitled to the whole of certain extensive immoveable properties in the Jhang district of the Punjab which had formerly belonged to his maternal grandfather, Hassan Shah, or only to a half-share therein, the other half-share having devolved on Sardar Bibi, the respondents' mother. In 1935 the appellant sued Sardar Bibi on the footing that he was in possession of one half for a declaration that he was entitled to the whole, and in 1936 Sardar Bibi brought a suit against the appellant claiming the whole in like manner. These suits were tried together and on 28th February, 1939, the trial Court decided that the appellant was entitled to the whole of the property. Sardar Bibi had in the meantime died and was represented by her sons the two respondents before the Board. On appeal the High Court at Lahore by decree of 27th May, 1940, held that the appellant was entitled to a half-share only and the respondents to the other half. Hence this appeal. The appellant relies in the first instance upon a deed of gift dated 1st May, 1934, which purports to be a transfer to him by Sat Bharai of the whole of the property. Independently of that deed, he relies upon the admitted fact that the respondents' mother, Sardar Bibi, was married "outside the family"—that is to say, that her husband, the respondents' father, Akbar

Shah, was not a member of her father's family. These two grounds of claim have to be justified by the customary law of the Jang district applicable to Sayyads.



The property in suit belonged to Hassan Shah, who died in 1893, leaving an only son, four widows and three daughters. One widow (Mahmud Khatun) died a few days after him and his son died in the next year. Nevertheless the son succeeded to the properties and is the person from whom succession must now be traced. One of the three daughters of Hassan was Sardar Bibi whose mother had predeceased Hassan, and in 1895 the properties were recorded in the revenue papers in the names of the three remaining widows and Sardar Bibi. The latter having married in 1902 and Allah Jowai having died in 1905, the properties after some litigation were entered in the names of the two remaining widows Jindwaddi and Nur Bhari. In 1911 Jindwaddi died, having survived her daughter, Bakht Bhari (the appellant's mother), and Jindwaddi's share was recorded in the name of her unmarried daughter Sat Bharai. In 1918 on the death of the remaining widow Nur Bhari, her share also was recorded as belonging to Sat Bharai who thus came into possession of the whole property. Their Lordships are not called upon to comment on the correctness of these mutations and must not be taken as objecting to any of them. Sat Bharai died unmarried on 2nd May, 1934, and the deed of gift by her upon which the appellant relies is dated the previous day.

Many witnesses were called on each side at the trial, but their Lordships are satisfied that the customary law as declared in the *Riwaj-i-am* of the Jhang district must determine the rights of the parties. The evidence adduced in the present case does not in their Lordships' opinion modify or affect the customary rules as revised and restated at the settlement of 1924-1925 and published in English in 1929. This is *prima facie* to be regarded as the most accurate and fully considered statement of long-standing custom. The answers which are important are those to questions 39, 63, 69, 73 and 79.

Question No. 39 (old question No. 1).—(*a*)—What do you mean by the term " Aulad " for the purpose of succession?

(*b*) if a man dies leaving a widow or widows, a son or sons, a daughter or daughters, brother and other relatives, upon whom will the succession devolve? State the order of succession.

Answer—All tribes.—(*a*) The term " Aulad " means the male lineal descendants.

(*b*) Male lineal descendants have prior claims to inheritance. Qureshi Hashmi residents of village Shorkot state that, in the absence of a male issue in the family, the daughters inherit on the death of their father. The faqir Mujawars of Atharan Hazari Tahsil Khang, also state similarly. Other tribes admit that succession in the first place goes to the sons and their direct male lineal descendants, failing them to the widow till death or remarriage, failing widows to unmarried daughters until their marriage, failing these to the collateral descendants of the common male ancestor. In the absence of male collateral kindred within five degrees, daughters,

their sons, sisters and their sons succeed in the order given. If the deceased leaves a widow and unmarried daughters from another wife, half the property goes to the widow and half to the daughters. The following tribes profess a different custom:—

. . . . . .

4. Among Mohammadans those daughters and sisters who are married to male collateral kindred within five or six degrees have a preferential claim to inherit, to the daughters and sisters who have been married to remote male collateral relatives or strangers.

Question No. 63 (old question No. 15).—Do daughters take a share when there are no sons?

Answer—All tribes.—In the absence of sons, daughters succeed until marriage, and when they are married, the collaterals of their deceased father succeed to the property.

Question No. 69 (old question No. 18).—What is the nature of the interest taken by a daughter in the property she inherits? What are her rights of alienation, if any, by sale, gift, mortgage or bequest?

Answer—All Mohammadans.—The general consensus of opinion seems to be that when daughters inherit on account of failure of collaterals within 7 degrees, they have full powers of alienation. In other cases they cannot sell or mortgage except for necessity.

Question No. 73 (old question No. 19).—Do the sons of several daughters share equally or by representation from their mothers?

Answer—All tribes.—After daughters their sons succeed and the sons of several daughters inherit the property of their mothers respectively.

Amongst Mohammadans, sons of those daughters get the share who are married with collaterals within fifth or sixth degree. The sons of those who have been married in different castes cannot succeed except when there are no collaterals within the sixth degree.

Question No. 79 (old question No. 25).—In the presence of sons do sisters inherit? If so, what is their share with reference to daughters? If sisters are excluded by male collaterals, must the latter be within a particular degree or relationship? Do sister's sons (or husbands) ever succeed? If so, how are their share computed?

Answer—All tribes.—In the presence of sons sisters do not inherit. In the absence of male lineal descendants, widows, daughters, mother of deceased, and unmarried sisters succeed successively till marriage. Sisters have the same rights as unmarried daughters till their marriage as laid down in answer to question No. 39.

In the absence of collaterals, sisters get their full shares and if they die, their sons succeed by representation to their mothers' share. Among Mohammadans those sisters who have been married to the collaterals of their brothers have prior rights compared with sisters married in different families or castes.

In the cases when inheritance could devolve on sisters, in their absence, sisters' sons succeed to their mothers' shares. The husband of a sister, however, is not entitled to succeed in any case.

The first question is whether Sat Bharai as an unmarried sister of Allah Yar Shah had an interest which did not come to an end at her death, or whether she had what in the language of the Hindu law is called the interest of a " limited " owner. It is useful to bear in mind that a right to alienate the property, restricted to occasions of legal necessity or limited by other kinds of restriction, is sometimes attached by custom to the interest of a limited owner. But no question here arises as to the existence of such a right. If her interest terminated with her life the appellant for the purposes of the present case took nothing by Sat Bharai's deed of gift.

It is to be collected from the answers to questions 39 and 79 that Sat Bharai as an unmarried sister succeeded to the property " till marriage " just as an unmarried daughter might have succeeded. Sister and daughter if unmarried are bracketed with widows and the mother of the deceased in the answers to these questions. When a daughter marries she may or may not acquire another interest: this will depend on whether there are then collateral male agnates within five degrees; whether her husband is from outside or inside the family; whether she has sisters married outside or inside the family. If she does acquire an interest as a married woman she takes it as full owner. But until she marries she has, in their Lordships' view, only that right as owner which is given to the unmarried woman

as suitable to her unmarried condition—an interest which comes to its ordinary and natural termination when she marries, and which does not extend in any case beyond her life. Their Lordships feel obliged to reject any suggestion that the unmarried daughter or sister takes an absolute or heritable interest upon which her marriage works a forfeiture. That a temporary provision for her while single should come to an end upon her marriage seems reasonable enough, but it is difficult to believe that an absolute interest should be given and then forfeited merely because she marries—especially as collaterals within five degrees exclude her altogether when she marries. That she should be given a preferential position so as to be a fresh stock of descent but only if she dies unmarried: that she should have a right to alienate as she likes but so that her subsequent marriage will forfeit her grantee's estate—these consequences put a strained construction upon the simple provisions of the *Riwaj-i-am*. Whereas it is well in accordance with accepted notions that before the estate of the deceased owner can go in absolute right to anyone who is not a male descendant it must provide a limited interest for widows and unmarried women. The remarriage of a widow terminates her interest for reasons not comparable to those which apply when an unmarried daughter marries. But otherwise the interest which they take as such has the same characteristic limit. As compared with the right taken by her married sisters—which is described as the right of a full owner (question 70) and as including full powers of alienation (answer 69)—the unmarried daughter is given a right more suitable to the general situation of an unmarried woman—a prior right extending to the whole estate: a right by which while she remains unmarried she is the owner but a " limited owner ".

The first clause of the answer to question 79, as their Lordships read it, deals with unmarried sisters, the second and third with married sisters only. So too in the answer to question 39 (*b*) " unmarried daughters " and " daughters " are words employed antithetically, and under question 69 the reference to daughters who inherit on account of failure of collaterals within seven degrees is as previous answers show a reference to married daughters. Their Lordships arrive at the same conclusion as Din Mohamad J. and hold that the interest of Sat Bharai did not extend beyond her life. She had no general right to alienate, and no absolute or heritable interest in any part of the property. In this view it becomes unnecessary to consider whether the deed of 1st May, 1934, is proved to have been entered into by her with such knowledge and free consent as to be an effective disposition.

The second question is whether the appellant who does not claim that his father Khuda Yar Shah was nearer than the ninth degree to Hassan Shah can claim to succeed on the death of Sat Bharai in preference to his mother's sister, Sardar Bibi, because the latter's husband was not a member of the family. Their Lordships are satisfied that the *Riwaj-i-am* gives no countenance to the view that Sardar Bibi was wholly disqualified by such a marriage from succeeding. The observations of the learned Subordinate Judge which compare her position to that of a fallen or degraded woman are as incorrect as they are invidious. The *Riwaj-i-am* at question 39 states that daughters and sisters married to male collateral kindred within five or six degrees have preference to those married to remote male collateral relatives or strangers. To question 73 the like proposition is affirmed as regards the sons of daughters: this answer contemplates that the sons of a daughter married in a different caste can succeed if there are no collaterals within the sixth degree. Their Lordships agree with the construction put by the High Court on the answer to question 79 and think that the word " collaterals " is not to be taken as meaning " collaterals however remote " but is to be taken with the previous answers, including the answer to question 39, where it is expressly stated that sisters are not preferred unless they have married a collateral within the fifth or sixth degree. It is impossible for the appellant to succeed upon the strength of the evidence called by him upon the meaning of the word " *kufv* " (family). Apart from the fact that evidence of the same unsatisfactory character has been called in equal if not greater quantity for the respondents, a number of the

appellant's own witnesses put him out of court. It is to be collected from the *Riwaj-i-am* that the line of cleavage is somewhere about the sixth degree and it is enough to say that accepting the appellant's own pedigree as put forward by him, their Lordships cannot hold that he has shown any rule of customary law which entitled his mother to be preferred to Sardar Bibi or himself to the respondents.

Their Lordships have already expressed their obligation to Mr. Pritt for a clear and able argument. They will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondents' costs of the appeal.

(30679) Wt. 82 6—23 170 12/43 D.L. G. 338

In the Privy Council

MIAN SALEH MOHAMMAD SHAH

v.

SAYYAD ZAWAR HUSSAIN SHAH AND ANOTHER

SAME

v.

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DELIVERED BY SIR GEORGE RANKIN

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